* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CRL.REV.P. 850 of 2005

Reserved on : 21st July, 2007
Date of Decision: 20th August, 2007

SANJIB GHOSE ROY … PETITIONER
Through: Shri G.C. Mishra, Advocate

Vs.

G.S. ARORA & ORS … RESPONDENTS
Through: Shri S.P. Batra, Advocate for R-1 and R-2
Shri Pawan Sharma, APP for R-3 State

CORAM:
Mr.Justice S. Ravindra Bhat

1. Whether reporters of local papers may be allowed to see the judgment.? Yes

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

Mr.Justice S. Ravindra Bhat

1. This is a complainant's revision against the order of the Additional Sessions Judge (hereafter "ASJ"). By that order, dated 14-5-2005, the ASJ set aside two orders of the learned Metropolitan Magistrate ("the trial court"). The trial court, by the first order dated 25-7-2003 had allowed an application under Section 311 and summoned an additional witness. After her examination, by the second order, dated 14-5-2004, it issued an order under Section 319, Criminal Procedure Code,

summoning Shri G.S. Arora, and also observed that the accused Rattan Singh appeared to have been involved in committing offences under Section 304, Indian Penal Code (IPC).

2. The facts of the case are that in execution proceedings for enforcement of a decree, warrants of attachment of movable and immovable properties of judgment, debtor Sh. Chiranjit Roy were issued by the court of Addl. Distt. Judge. The decree holder was G.S. Arora, respondent before this court. The warrant of attachment was assigned to Sh. Rattan Singh, bailiff (accused hereafter referred to as A-1). A-1, met judgment debtor Sh. Chiranjit Roy with warrants of attachment along with decree holder, on 2.1.995. He produced both warrants of attachment, disclosed his identity as bailiff, stating that he had to execute the warrants. On that the judgment debtor became nervous and wrote on the back of warrants that he had preferred revision against the order of attachment. There was, however no stay of execution. A-1 called the decree holder and asked if he agreed to stop the execution. The decree holder did not however agree.

3. The judgment debtor became more nervous. His wife informed that the judgment debtor was a heart patient and if execution continued any unfortunate mishap might occur. Seeing the condition of the judgment debtor, the decree holder agreed to stop the execution and went away. A-1 submitted his report of non-execution of warrant. Later it was discovered that the judgment debtor died on

2.1.95 and a case for commission of offences under Sections 304/451/384/34 IPC was registered on the statement of wife of deceased Smt. Latika, Ghosh through FIR No.21/95 dated 2.1.1995. A-1 was released on bail.

4. The matter was investigated. A charge sheet was filed after investigation. The trial court committed the matter to Sessions, holding that the case was triable by the Court of Sessions. The ASJ, by a detailed order dated 26.10.1998 held that no offence under Section 304 of IPC was made out. He accordingly directed return of case file to the learned Metropolitan Magistrate. The trial court framed charge under Sections 451/384/34 of IPC against A-1.

5. In the meantime, complainant Smt. Latika Roy died. She was an eye witness of the case. Five witnesses were examined and PW 1 Sanjeev Roy son of deceased deposed on the basis of information given by his mother. On an application under Section 311 Cr. P.C Mrs. Rajshree Ghosh was examined and on an application under Section 319 Cr. P.C. Ltd., the trial court took cognizance of the offence under Section 304 IPC against A-1 the respondent Shri. G.S. Arora, the decree holder by its order dated 14.5.2004.

6. A-1's revision was premised on the ground that the order dated 14-5-2004 was conjectural. He alleged that the trial court failed to consider that the ASJ had earlier concluded that no case of offence under Section 304 of IPC was made out.

PW-6 was examined to fill up the lacuna, when no eye witnesses were left after the death of complainant, Smt. Latika Roy. She did not allege that the deceased was beaten by A-1 or the decreeholder. It was alleged that only a clerk was examined to prove the postmortem report. The trial Court wrongly invoked section 319 Cr. P.C. It failed to see that A-1 was discharging his duties as public servant i.e. bailiff. It was similarly urged on behalf of Shri G.S. Arora that the trial court exceeded its jurisdiction. Ms. Rajashri was examined after nine years; previously she never claimed to be an eye witness. She was examined to fill up a lacuna. There was no evidence that he inflicted any injury.

7. The trial court, by order dated 14.5.2004 concluded that PW 6 and PW 1 deposed on oath that Sh. G.S. Arora and A-1 forcibly obtained signatures of the deceased on some blank papers and gave beatings. The postmortem report showed that the deceased had suffered injuries on his person. The contents of FIR that the deceased had been given a simple push was doubted. The presence of G.S. Arora and A-1 was not disputed. It held that death of a human being had occurred. The court observed that the materials collected by police during investigation appeared to be manipulated. It was held that the case was one of culpable homicide and extortion; *prima facie* the offence under Section 304 IPC was attracted.

8. The ASJ observed that the trial court's order of 25.07.03 under section 311 Cr. PC was made on the application dated 19.9.2002 on behalf of the prosecution,

introducing a new case altogether different from that of FIR. For the first time, it was alleged that the deceased was beaten up. Earlier no allegation of beating by any person to deceased was made. PW-6 introduced the story of beating by lathi, danda, hockey stick, gun etc. This new case was introduced after more than seven years. The ASJ held that the order under section 311 Cr. PC occasioned miscarriage of justice. He also held that there was no justification for recourse to Section 319 of the Code of Criminal Procedure.

9. Mr. G.C. Mishra, learned counsel for the petitioner submitted that the ASJ fell into error. He firstly submitted that the court did not possess jurisdiction under Section 397 to entertain the revision petition, since the orders of the trial court, impugned by A-1 and the respondent, were interlocutory. He relied upon the bar under Section 397(2) for the purpose. He relied upon the decision reported as *Superintendent and Remembrancer Legal Affairs, WB -vs- Ashutosh Ghosh* 1979 (3) SCC 381 to say that a committal order could not be interfered with in revision. He also relied upon the judgment in *Parmeshwari Devi -vs- State* 1977 (1) SCC 169, to say that a revision proceeding is not maintainable in such cases.

10. Counsel relied upon four representations said to have been addressed by Ms. Latika Ghosh, dated 22-1-1995,28-3-95, 26-1-1996 and 13-12-1996, to say that she had wanted to place on record other facts, about assault on the person of the deceased, resulting in his death. It was submitted that these were the basis of

the application under Section 311. The letters had mentioned about presence of PW 6 Ms. Rajshri Ghosh Roy. The said PW-6 was examined on 28.02.2004. She corroborated the allegation of an assault on the deceased; as a result, the court acted within its jurisdiction in summoning G.S. Arora, under Section 319, and taking cognizance under Section 304 IPC, against him and A-1. It was also submitted that the postmortem report corroborated the version of PW-6, about assault.

11. Mr. S.P. Batra, learned counsel for the respondent submitted that the case was resistered on 2.1.1995 with the statement of Smt. Latika Ghosh Ex. PW 1/B. She did not state that the accused were armed with Lathi, danda, hockey stick or gun; she also did not allege that any weapon was used by any assailants against the deceased. She never alleged that 9/10 persons armed with weapons went to her house, or anyone assaulted with any weapon on the person of deceased. It was alleged that forcible signatures of deceased were obtained on a piece of paper. Her husband felt unwell, he sat down of sofa. She gave him water. He, however could not drink it, and expired. Counsel submitted that the first two representations addressed by the complainant, dated 22-1-1995 and 28-3-1995, were silent about any assault. They did not mention about the presence of Ms. Rajshree. The complainant only mentioned about presence of Shri Narayan Banerjee.

12. Learned counsel submitted that the complainant had recorded two

statements, i.e on 2-1-1995 and later on 12-1-1995. In these, there was no mention of any violence; the only allegation made was about A-1 forcibly obtaining signatures of the deceased and his falling down on the sofa. The first statement mentioned the presence of 9-10 persons. The statement of Sanjib Roy, the present revisionist and son of the complainant, is on the same lines as his mother. Shri Narayan Banerjee's statement under Section 161 Cr. P.C. also was on the same lines. In these circumstances, the prosecution could not come out with an entirely different version, about the presence of someone who had never figured, more than 8 years later.

13. Counsel submitted that the later two representations of the complainant had never seen the light of the day; they were not part of the record. They were produced for the first time along with the application under Section 311. This procedure was unheard of, since the prosecution never filed any report after any further investigation under Section 173 (8). Basing itself on these, the court issued the order for examination of Ms. Rajshree, who was never cited as a witness. Her alleged presence was suspect; she was clearly brought in to fill the lacunae of the prosecution. This led to the order under Section 319, Cr. PC.

14. Counsel lastly submitted that the order of the revisional court could not be called interlocutory, since it had a grave and prejudicial impact on both the accused. The trial court's orders sought to put the respondent on trial after over 8

years, in the absence of any role attributed to him; it sought to take cognizance against A-1 in respect of Section 304 IPC, a course of action which had been ruled out by an ASJ as far back as in 1999; that order had attained finality.

15. Learned counsel submitted that the revisional court rightly concluded that recourse to Section 319 was unwarranted on the facts of the case; it had relied on the judgment of this court, reported as *Sandeep Sharma Vs. State* 87 (2000) DLT 268.

16. The trial court framed the charge on 4.2.99 after four years. PW 1 was examined on 7.10.1999; he deposed on the basis of information given by his mother. He did not state that Ms. Latika Ghosh informed him about his father being beaten by hockey stick, danda, lathi or gun. He did not also depose about any information about incident allegedly given by his wife PW 6. On 14.09.2000 PW 2, PW 3 and PW 4 were examined. They too did not mention about such incidents, or the presence of Ms. Rajshri Ghosh Roy. PW 6 Rajshri Ghosh Rai was examined on 28.02.2004. The revisional court noticed that she nowhere explained why she was quiet for more than 9 years. It further noted that PW 1 did not state that his wife was eye witness. It also noted that as per the death report, no mark was found on the body.

17. The revisional court reasoned that after the death of the deceased judgment debtor, his rights and liabilities shifted to legal representatives; the decree holder

could enforce the execution against the son, wife and even daughter in law in place of deceased. This according to it was a strong motive to implicate G.S. Arora in the case by leading a coloured version, which was never the case of prosecution. The court relied upon Section 78, IPC. It was of the opinion that there was no recovery of any weapon. It was therefore concluded that the testimony of PW6 was unacceptable as it was contrary to the case of prosecution. PW6 deposed something which found no place in the FIR. The court also considered the statement of PW-6, and doubted its veracity, concluding that allegations of beating by A-1 and G.S. Arora were vague.

18. In *Parameshwari Devi's case* (supra), the Supreme Court held as follows:

> *"The Code does not define an interlocutory order, but it obviously is an intermediate order, made during the preliminary stages of an enquiry or trial. The purpose of sub-section (2) of Section 397 is to keep such an order outside the purview of the power of revision so that the enquiry or trial may proceed without delay. This is not likely to prejudice the aggrieved party for it can always challenge it in due course if the final order goes against it. But it does not follow that if the order is directed against a person who is not a party to the enquiry or trial, and he will have no opportunity to challenge it after a final order is made affecting the parties concerned, he cannot apply for its revision even if it is directed against him and adversely affects his rights.*
>
> *8. A somewhat similar argument came up for consideration before this Court in Mohan Lal Magan Lal Thacker v. State of Gujarat AIR 1968 SC 733. The controversy there centred round the meaning of Article 134(1)(c) of the Constitution and the Court examined the meaning of the words "final" and "interlocutory". It was held that the meaning "had to be considered separately in relation to the particular purpose for which it is required" to be interpreted. No single test can be applied to determine whether an order is final or interlocutory. Then it has been held by this*

Court in that case as follows :

> *"An interlocutory order, though not conclusive of the main dispute may be conclusive as to the subordinate matter with which it deals."*
>
> *It may thus be conclusive with reference to the stage at which it is made, and it may also be conclusive as to a person, who is not a party to the enquiry or trial, against whom it is directed. As has been shown, the order of the magistrate dated August 8, 1974 was not according to law and it adversely affected the appellant, who was not a party to the enquiry or trial, as it was solely directed against her. As is obvious, she could have no opportunity to challenge it after the making of the final order, and such a belated challenge would have been purposeless for it would have given her no relief. So in so far as the appellant is concerned, the order of the magistrate could not be said to be an interlocutory order and the revisional courts erred in raising the bar of sub-section (2) of Section 397 against it."*

It is apparent that there can be no thumb rule as to what constitutes an "interlocutory" order; much would depend on the character of the order, and the stage of the proceeding. In the present case, like in the above case, the cognizance in respect of A-1, taken contrary to the orders of ASJ (which had become final) and the order under Section 319 issued after 8 years, did prejudice both the A-1 and the respondent. The revision was therefore, maintainable.

19. Section 319 of the Cr. PC has to be used sparingly, and in rare cases, where the court is convinced that the person concerned has to be summoned. The law on the subject was recently summarized as follows, by the Supreme Court, in *Mod. Shafi Vs. Mohd. Rafiq & Anr*.2007 AIR SCW 3399. The court held as follows:

> *"Before, thus a trial court seeks to take recourse to the said provision, the requisite ingredients therefore must be fulfilled.*

Commission of an offence by a person not facing trial must, therefore, appears to the court concerned. It cannot be ipse dixit on the part of the co9urt. Discretion in this behalf must be judicially exercised. It is incumbent that the court must arrive at this satisfaction in this behalf.

As interpretation of the above mentioned provision is now covered by some decisions of this Court, we need not state ingedietns at this stage.

In Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and others (1983) SCC 1 a Division Bench of this Court while holding that even if a person had not been sent for trial by the police, the trial court would be entitled to invoke its jurisdiction after taking evidence, stating

"19. In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the court can take cognizance against them and try them along with the other accused. But, we would hasten to add that this is really an extraordinary power which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken. More than this we would not like to say anything further at this stage. We leave the entire matter to the discretion of the court concerned so that it may act accordingly to law".

This aspect of the matter has also recently been considered in Yuvrag Ambar Mohite Vs. State of Maharashtra, reported in (2206) 10 Scale 369.

Respondent No.1 state that he was merely a witness. He had no say in the matter. We thus fail to understand as to how, at this instance, and , that too. at that stage, the High Court could entertain an application under Section 482 Cr. P.C. The judgment and order dated 26.08.2006 passed by the learned sessions judge was not even an interim order affecting the rights of the parties. even revision application there against could not have been maintained at that

stage.

The trial judge, is noticed by us, in terms of section 319 of the code of Criminal procedure was required to arrive at his satisfaction. If he thought that the matter should receive his due consideration only after the cross examination of the witnesses is over no exception thereto could be taken far less at the instance of a witness and when the State was not aggrieved by the same.

12. From the decisions of this Court, as noticed, above it is evident that before a court exercises its discretionary jurisdiction in terms of section 319 of the Code of Criminal procedure, it must arrive at the satisfaction that there exists a possibility that the accused to summoned is in all likelihood would be convicted. Such satisfaction can be arrived at Inter alia upon completion of the cross examination of the said witness. For the said purpose, the court concerned may also like to consider other evidence. We are therefore, of the view that the High Court has committed an error in passing the impugned judgment. It is accordingly set aside. The appeal is allowed."

20. As evident from the above, the court exercises its discretionary jurisdiction under Section 319 Cr. PC upon recording satisfaction that there exists a possibility "*that the accused to summoned is in all likelihood would be convicted"*. Such satisfaction can be arrived at upon completion of the cross examination of the said witness. For the purpose, the court concerned should also consider other evidence.

21. In this case, the contemporaneous statements of the complainant, Latika Ghosh, dated 2-1-1995 and the supplementary statement dated 12-1-1995, did not mention about any violence on the deceased. The other witnesses, i.e Sanjib Ghosh Roy and Narayan Banerjee, too, did not mention about such incidents; none of

them even mentioned the presence of Ms. Rajshree, PW-6. The first two representations of Latika Ghosh, to the Police Commissioner, dated 22-1-1995 and 28-3-1995 did not mention anywhere about violence of the kind spoken about by Ms. Rajshree; indeed it does not even mention about the latter's presence. After the death of Ms. Latika Ghosh, and after examination of prosecution witnesses, the four representations were used to move an application under Section 311. These too had not seen the light of day till then.

22. While it is true that Section 311 Cr. PC. has been enacted with the purpose of ensuring that vital evidence which is overlooked at earlier stages, is permitted to be led, yet that power cannot be used to set up a case which was never alleged by the prosecution. An order cannot be made, at least under circumstances as in the present case. The representations which were used to make the order under Section 311 had not been placed on record; they were not part of the prosecution case. They apparently were used in 1998 to move an application, which the prosecution did not file. In *Mohanlal Shamji Soni v. Union of India* (1991 Supp (1) SCC 271) the court cautioned against filling up lacuna in a criminal case, thus :

> *"It is therefore clear that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case."*

The above proposition was approved in *Rajendra Prasad-vs- Narcotic Cell* 1999 (6) SCC 110.

23. I am of the opinion, on a careful consideration of the record, that the trial court erred in allowing the application under Section 311 and later proceeding under Section 319, Cr. PC, summoning the respondent G.S. Arora. There was no material pointing to grave suspicion that the accused to be summoned in all likelihood could be convicted. Likewise, in the case of A-1, the trial court virtually reviewed the order of the ASJ, who had ruled out framing charges under Section

304, IPC. For these reasons, the ASJ did not fall into any jurisdictional error, or impropriety, in making the impugned order dated 14-5-2005.

24. In the above circumstances, the petition must fail; it is accordingly dismissed, without any order as to costs.

DATED: S. RAVINDRA BHAT
20th August, 2007 JUDGE